

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 13TH NOVEMBER 2007 / 22ND KARTHIKA 1929

SA.No. 629 of 1993(G)

AS.3/1989 of DISTRICT COURT, THALASSERY
OS.304/1985 of MUNSIF'S COURT, KANNUR

APPELLANTS:RESPONDENTS:DEFENDANTS 1 TO 6 AND 15 TO 20:

-
1. KAMBIL PUTHIYAKATH MARIYMA,
W/O.MAMMAVA,
CANNANORE TALUK.
 2. AMINA UMMA,
D/O.KAMBIL PUTHIYAKATH MARIYUMMA,
MUNDERI AMSOM AND DESOM,
CANNANORE TALUK.
 3. KATHEESUMMA, D/O...DO..DO..
...DO...DO....
 4. KUNHAMU, S/O.MAMMAVA, ..DO..DO..
...DO...DO....
 5. MAYAN, S/O...DO...DO....
....DO...DO....
 6. MOIDU, ...DO...DO....
....DO...DO.....
 7. ABDUL SALAM,...DO..DO..
...DO..DO....
 8. KUNHUPATHUMMA,
..DO..DO...DO...
 9. ISMAIL, ..DO..DO..
..DO..DO...
 10. ABDUL KHADIR,
..DO..DO....

KSS

..2/-

S.A.NO.629/1993

11. MARIYUMMA (MINOR AGED 16 YEARS)
MINOR 11TH APPELLANT IS REPRESENTED BY GUARDIAN
THE 3RD APPELLANT.

BY ADV. SRI.K.P.SREEKUMAR

RESPONDENTS: APPELLANTS AND 6TH RESPONDENTS: PLAINTIFF'S
1 AND 3 TO 8 LRS OF THE 2ND PLAINTIFF AND THE
6TH DEFENDANT:

-
1. CHALAT KUNHIPATHUMMA, AGED ABOUT 78 YEARS,
W/O.DECEASED MOIDEENKUTTY,
MUNDERI AMSOM AND DESOM,
CANNANORE TALUK.
 2. MARIYUMMA,
D/O.DECEASED MOIDEENKUTTY,
...DO...DO...DO.... - RECORDED AS LEGAL HEIR OF DECEASED R12.
 3. KUNHAMINA, D/O....DO..DO...
 4. AYISSA, D/O....DO...DO.....
 5. KADEESSA, D/O...DO..DO....
 6. NABEESSA, D/O...DO..DO.....
 7. ASSYA UMMA, D/O.....DO...DO....
 - *8. PUTHIYAPARAMBATH PULLUNDAYIL KUNHIPATHUMMA,
D/O.DECEASED AMINA,
RESIDING AT MUNDERI AMSOM AND DESOM,
CANNANORE TALUK – D I E D – IMPEADED:
 - *9. KADEESUMMA, D/O.AMINA,
AGED ABOUT 80 YEARS,
RESIDING AT MUNDERI AMSOM AND DESOM,
CANNANORE TALUK. - D I E D – IMPEADED:
 - *10. ALEMMA, AGED 74 YEARS,
MUNDERI AMSOM AND DESOM,
CANNANORE TALUK – D I E D – IMPEADED:

S.A.NO.629/1993

- *11. MARIYUMMA, AGED 71 YEARS,
MUNDERI AMSOM AND DESOM,
CANNANORE TALUK. - D I E D- LRS IMPEADED:
- *12. MOIDEEN, AGED 68 YEARS,
MERCHANT, ..DO..DO.... - D I E D – LRS IMPEADED:
- *13. NABEESU, AGED 64 YEARS,
...DO...DO..... - D I E D – LRS IMPEADED:
- 14. KUNHAMINA, D/O.DECEASED ASSYA,..DO...DO....
- 15. PULLUNDAYIL KHADEEJA,
W/O.DECEASED KUNHIMAYAN, AGED 46 YEARS,
...DO..DO...
- 16. ..DO...MOIDU, ..DO...DO...
- 17. ...DO...FATHIMA (MINOR AGED 17 YEARS),
...DO...DO....
- 18. ..DO...KAMALUDEEN (MINOR AGED 16 YEARS)
...DO...DO....
- 19. ...DO...MYMOONATH (MINOR AGED 14 YEARS)
...DO..DO....
- 20. ...DO....SAKEENA (MINOR AGED 12 YEARS)
....DO...DO....
- 21. ...DO...SOIJATH (MINOR AGED 10 YEARS)
...DO...DO.....
- 22. ...DO...SULAIKHA (MINOR AGED 9 YEARS)
....DO...DO....
- 23. ...DO....SAKKAREENA (MINOR AGED 8 YEARS)
...DO...DO....
- 24. ...DO...AFSATH (MINOR AGED 7 YEARS)
...DO..DO....
- *25. PUTHIYAPARAMBATH PULLUNDEYIL AYISSUMMA,
...DO...DO.... (D I E D) – LRS IMPEADED:

(MINOR RESPONDENTS 17 TO 24 ARE REPRESENTED BY THEIR
GUARDIAN THE 15TH RESPONDENT)

S.A.NO.629/1993.

*ADDL.R26. ABOOBACKER,
AGED 50 YEARS,
S/O.ABDULLA, MUNDERI AMSOM AND DESOM,
KANNUR TALUK – RESPONDENT NO.10 DIED-LRS IMPEADED:

*ADDL.26TH RESPONDENT IS IMPEADED AS LEGAL REPRESENTATIVE
OF THE DECEASED 10TH RESPONDENT AS PER ORDER DTD.
11/11/99 ON C.M.P.NO.1539/94)

R27. AYISSUMA, D/O.DECEASED KUNHIPATHUMMA,
PATHIYAPARAMBATH PULLUNDAYIL,
MUNDERI AMSOM AND DESOM, P.O. MUNDERI,
(VIA) EACHOOR, KANNUR DISTRICT.

R28. KUNHIMUHAMMAD, S/O.DECEASED KUNHIPATHUMMA,
....DO...DO.....

R29. KADISSA, D/O....DO.....DO...

*R30. KADIRKUTTY, S/O.DECEASED KUNHIPATHUMMA,
...DO...DO..... (D I E D) – IMPEADED:

R31. MARIAM, D/O...DO...DO.....

(ADDITIONAL RESPONDENTS 27 TO 31 ARE IMPEADED AS PER
ORDER DTD. 28/06/04 IN C.M.P.NO.2087/96)

R32. PUTHIYAPARAMBATH PULLUNDAYIL MOIDEENKUTTY,
S/O.UMMER, RESIDING IN MARIYUR AMSOM AND DESOM,
(VIA) KOODALI, TALIPARAMBA TALUK, CANNANORE DISTRICT.

R33. ...DO....ANDU, ...DO...DO....

R34. ABOOBACKER, S/O...DO....., BUSINESS, CHERUVATHALAMOOTTA,
...DO...DO....

R35. CHOCKRAN, S/O...DO...DO....

R36. MAMAD, S/O...DO...DO.....

R37. MAYIM, S/O...DO...DO.....

(ADDITIONAL RESPONDENTS 32 TO 37 ARE IMPEADED AS PER
ORDER DTD. 28/06/04 IN C.M.P.2186/96)

KSS

S.A.NO.629/1993

- R38. BEEVI, W/O.KADIRBUTTY,
D/O. K.T. MAMMA, CHOLAYIL HOUSE, ULIYIL,
P.O. ULIYIL, (VIA) MATTANNUR, KANNUR – 670 702.
- R39. KAMARUNEESA (MINOR AGED 17 YEARS),
D/O. BEEVI, CHOLAYIL HOUSE, ULIYIL,
P.O. ULIYIL, (VIA) MATTANNUR, KANNUR – 670 702.
- R40. FOUSIA (MINOR AGED 15 YEARS),
D/O. BEEVI, ...DO...DO.....
- R41. SAMURA (MINOR AGED 13 YEARS),
D/O.BEEVI, ...DO..DO....
- R42. SALEENA (MINOR AGED 10 YEARS),
D/O. BEEVI, ...DO..DO....

(MINOR RESPONDENTS 39 TO 42 ARE REPRESENTED BY THEIR
MOTHER AND GUARDIAN THE 38TH RESPONDENT)

(ADDITIONAL RESPONDENTS 38 TO 42 ARE IMPEADED AS PER
ORDER DTD. 28/06/04 IN C.M.P.NO.1681/98

- *R43. PATHUMMA, W/O.KHADER, RESPONDENT NO.9 DIED – LRS
D/O.DECEASED KADEESUMMA, IMPEADED:
PARAMBIL HOUSE, KACHERI PARAMBU,
MUNDERI P.O.(VIA) EACHUR, KANNUR DISTRICT .

(ADDITIONAL 43RD RESPONDENT IS IMPEADED AS LEGAL
REPRESENTATIVE OF THE DECEASED 9TH RESPONDENT
AS PER ORDER DTD. 18/06/04 IN C.M.P.NO.2068/99)

***THE LEGAL REPRESENTATIVES OF DECEASED R13:**

- R44. AYISSA,
KEKKATHALA HOUSE, P.O. MUNDERI, EACHOOR,
KANNUR DISTRICT.
- R45. ABDUL KHADER IN ...DO...DO....
- R46. MARIYAM, IN ...DO...DO.....

THE LEGAL REPRESENTATIVES OF DECEASED R13 ARE IMPEADED
AS ADDITIONAL RESPONDENTS 44 TO 46 AS PER ORDER DTD.
5/07/07 IN I.A.NO.884/2007.

S.A.NO.629/1993

*THE LEGAL REPRESENTATIVES OF DECEASED R11:

- R47. MAMMAD, BUSINESS, CHERUVATHALA MOTTA,
P.O. CHATTOVAPARA, KUTTALI, KANNUR DISTRICT.
- R48. IBRAHIM MASTER, KANACHERRY,
EACHOOR, KANNUR DISTRICT.
- R49. MUSTAFA, KULOTHIN HOUSE,
P.O. MUNDERI, (VIA) EACHOOR, KANNUR DISTRICT.
- R50. MAYIN, KALIYADOM POYIL, P.O. MUNDERI,
(VIA) EACHOOR, KANNUR DISTRICT.
- R51. ABDUL SALAM, C/O.MUSTAFA,
KULOTTIN HOUSE, P.O. MUNDERI, (VIA) EACHOOR,
KANNUR DISTRICT.
- R52. HAFSATH, THARIYIRI, P.O. CHEBBIBULAM,
MUNDERI, KANNUR DISTRICT.
- R53. KHADEEJA,
FATIMA MANZIL, KAIPAKAYIL, P.O.MUNDERI,
KANNUR DISTRICT.

*THE LEGAL REPRESENTATIVES OF DECEASED R11 ARE IMPEADED
AS ADDITIONAL RESPONDENTS 47 TO 53 AS PER ORDER DTD.
5/11/07 IN I.A.882/2007.

*THE LEGAL REPRESENTATIVES OF DECEASED R12:

- R54. YUSUF, S/O.MOIDEEN,
NEAR CHERUVATHALA MOSQUE, CHATTUBAPARA,
KUTTALI, KANNUR DISTRICT.
- R55. ABDUL KHADER, S/O...DO...IN ..DO...DO....
- R56. KUNHAMINA, D/O...DO....IN ...DO...DO.....
- R57. KHADEEJA, D/O...DO.....
RESIDING AT MADATINBOOVAL, P.O.NARATH, KANNUR.

....7.....

S.A.NO.629/1993

***THE LEGAL REPRESENTATIVES OF DECEASED R12 ARE
IMPLEADED AS ADDITIONAL RESPONDENTS 54 TO 57 AND
SECOND RESPONDENT IS RECORDED AS ONE OF THE LEGAL
HEIRS AS PER ORDER DTD. 5/11/2007 IN I.A.886 AND 888/2007.**

**BY ADV. SRI.C.KHALID)
SRI.N.GOPINATHA PANICKER)
SRI.R.O.MUHAMED SHEMEEM)
SRI.T.P.SAJID) for R2 to R7, R14 to R31 &
T38 to R42**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 13/11/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO.629 OF 1993

Dated 13th November 2007

J U D G M E N T

Defendants 1 to 6 in O.S.304/1985 on the file of Munsiff court, Kannur are the appellants. Respondents 1 to 7 are the plaintiffs and legal heirs of deceased second plaintiff. Respondents 8 to 26 are other defendants. On the death of second respondent respondent No.12 was recorded as her legal heir. On the death of respondent Nos.8,9,10,11,12,13 and 25, additional respondents 26 to 57 were impleaded as their legal heirs. Plaintiffs instituted the suit seeking a decree for partition and separation of 2/6 shares due to them. Plaint schedule property having a measurement of 24 x 54½ koles and is in R.S.No.55/7 of Munderi village of Kannur Taluk. It admittedly belonged to Chokran Musaliar under Ext.A1 kuzhikanam deed dated 4/2/1943. Chokran Musaliar admittedly died on 13/11/1944 as a bachelor. His parents admittedly pre-deceased him. Deceased Mammav and Moideenkutty are his brothers and sixth defendant and

deceased Amina are his sisters. On the death of Mammav his rights devolved on the widow of first defendant and children, defendants 2 to 6. On the death of Moideen Kutty his rights devolved on first plaintiff widow and plaintiffs 2 to 7, and eighth defendant their children. On the death of Amina her rights devolved on defendants 2 to 13, her children and fourteenth defendant, the daughter of her pre-deceased daughter. Plaintiffs contended that on the death of Chokran Musaliar his rights devolved on his legal heirs namely, the brothers and sisters and being the legal heirs of the deceased brother, they are entitled to get $\frac{2}{6}$ shares and being the legal heirs of other deceased brother Mammav, defendants 1 to 6 are entitled to $\frac{2}{6}$ shares and sixth defendant is entitled to $\frac{1}{6}$ share and defendants 7 to 14 are entitled to remaining $\frac{1}{6}$ share due to deceased sister Amina. Contending that on the death of Chokran Musaliar plaintiff schedule property devolved on plaintiffs and defendants and plaintiffs are in joint possession of the property suit was filed seeking separation of their shares. Defendants 1 to 5 and 15 resisted the suit. Appellants in their written statement contended that Chokran Musaliar during his life time, while he was in possession of the property entrusted it to his

brother Mammav as a sub tenant with a stipulation to pay Rs.5/- as purappad, apart from the purappad payable to the jenmi and accordingly Mammav has been in possession of the property paying purappad to the jenmi and revenue to the State and he has effected improvements and erected the building and has been in possession of the property since then and on the death of Chokran Musaliar plaintiffs or other defendants did not derive any right over the plaint schedule property. It was contended that sixth defendant, one of the legal heirs of Chokran Musaliar, who was having only intermediary right in the plaint schedule property released her right in favour of Mammv under Ext.B2 on 26/11/1973 for valuable consideration and while Mammav has been in possession of the property, he purchased jenm right from the Land Tribunal as per O.A.12364/1976 and on the death of Mammav his rights devolved on his legal heirs, the widow and children and plaintiffs or other defendants are not entitled to claim any share in the plaint schedule property. It was contended that their right was lost by ouster and adverse possession and limitation. Sixth defendant in her written statement admitted the case of plaintiffs but contended that Ext.B2 was got executed representing that it was a

pattam deed and it was not executed releasing her rights in favour of Mammav and she is entitled to get her share separated. Defendants 7 to 14 also filed a written statement admitting the plaint allegations. It was also contended that defendant No.12 had obtained 2 cents of land from Chokran Musaliar in 1948 with a stipulation to pay Rs.1/- as purappad and he constructed a building and is carrying on business in the building from 1949 and the said shop building is to be reserved in favour of defendant No.12.

2. Learned Munsiff on the evidence of PW1, Dws.1 and 2 and Exts.A1 and B1 to B42 dismissed the suit holding that on the death of Chokran Musaliar his rights did not devolve on plaintiffs or other defendants as Chokran Musaliar had granted a lease in favour of third defendant who obtained jenm right from the Land Tribunal and obtained purchase certificate and therefore plaint schedule property is not available for partition. Plaintiffs along with defendants 7, 8 and 10 to 14 challenged the judgment before District court, Thalassery in A.S.3/1989. Learned District Judge on re-appreciation of evidence found that there is nothing to support the case of contesting defendants that there was a lease in favour of Mammav as alleged by them. It was

found that on the death of Chokran Musaliar his rights devolved on all the legal heirs and Mammav being the eldest of legal heirs obtained the purchase certificate from the Land Tribunal and it shall enure the benefit of all and plaint schedule property is available for partition and right of plaintiffs or other defendants was not lost by ouster or adverse possession. Learned District Judge disbelieved the case of sixth defendant that Ext.B2 was executed without knowing that she is releasing her right in favour of Mammav. Finding that under Ext.B2 Mammav obtained $1/6^{\text{th}}$ share due to sixth defendant it was held that contesting defendants are entitled to get in addition to $2/6$ shares of Mammav, $1/6$ shares due to sixth defendant also. A preliminary decree was passed directing allotment of $2/6$ shares due to plaintiffs. It is challenged in the second appeal.

3. Though second appeal was admitted and notice was ordered substantial question of law as such were not formulated. Hence learned counsel appearing for appellants and respondents were heard and the following substantial question of law are formulated.

1) When first appellate court had accepted Ext.B2, whether finding that on the death of Chokran Musaliar his rights

devolved on all the legal heirs is sustainable.

2) Whether finding of first appellate court that on the death of Chokran Musaliar his rights devolved on all the legal heirs and they are in joint possession of the property is sustainable on the evidence on record.

4. There is no dispute on the fact that plaint schedule property originally belonged to Chokran Musaliar under Ext.A1 or that he died as a bachelor intestate. There is also no dispute with regard to geneology furnished by plaintiffs in the plaint as schedule A or inheritance of the estate of Chokran Musaliar. On the death of Chokran Musaliar his rights devolved on his two brothers and two sisters. Brothers would get one share each and sisters one hald share each. Therefore being the legal heirs of deceased Moideenkutty, plaintiffs are entitled to get 2/6 share. Similarly being the legal heirs of deceased Mammav, defendants 1 to 5 and defendant No.15 are entitled to get 2/6 shares. Sixth defendant is entitled to get 1/6 share. So also defendants 7 to 14 are entitled to get 1/6 share due to deceased Amina. Contention of the appellant was that during his life time Chokran

Musaliar had entrusted the plaint schedule property in favour of his brother Mammav, as a sub tenant with a liability to pay purappad. There is absolutely no evidence to prove the oral entrustment. In fact the day or year of entrustment was not pleaded. Trial court relied on Ext.B2, a release deed executed by the sixth defendant in favour of Mammav whereunder she released her fractional share, which devolved on her on the death of Chokran Musaliar in favour of Mammav. There is a recital in Ext.B2 to the effect that Chokran Musaliar had entrusted the property to Mammav. As rightly found by first appellate court the said recital do not show that there was an oral lease as claimed by contesting defendants. At best it could be said that there is an allegation in Ext.B2 that there was an entrustment of the property by Chokran Musaliar to his brother Mammav. That entrustment cannot be taken as a lease. As rightly found by first appellate court in the absence of any evidence to prove the oral lease, case of appellants that plaint schedule property exclusively belong to Mammav as a tenant will not stand. It was rightly rejected by the first appellate court. Though Mammav had obtained purchase certificate from the Land Tribunal, as rightly found by the first appellate court,

being the eldest of the co-owners that purchase certificate obtained in his name can only be taken as for and on behalf of all the co-owners. It shall definitely enure to the benefit of all the co-owners. Therefore, on the basis of the order of the Land Tribunal or the purchase certificate, appellants are not entitled to contend that other owners are not entitled to a share in the plaint schedule property.

5. Argument of learned counsel appearing for appellants is that as the first appellate court has rejected the case of sixth defendant that Ext.B2 was not executed with the knowledge that it is a release deed and as it was found that under Ext.B2 appellants are entitled to 1/6 share due to sixth defendant, it is to be taken that plaint schedule property is in the exclusive possession and enjoyment of the appellants and therefore without paying court fee as provided under Section 37(1) of the Kerala Court Fees and Suit Valuation Act, suit for partition as if it is in the joint possession of the co-owners is not sustainable. As rightly found by first appellate court once it is found that Mammav is one of the co-owners and appellants being the legal heirs of Mammav are in possession of the property, their possession could only

be for and on behalf of all other co-owners unless the contrary is proved. Rights of other co-owners would be lost only if it is ousted to their knowledge. Ext.B2 itself is sufficient to reject the case of ouster. If there was an ouster and rights of all the co-owners was lost as claimed by appellants, there is nothing for sixth defendant to assign in favour of Mammav. The very fact that Mammav had obtained 1/6 share due to sixth defendant under Ext.B2 establish that on the date of Ext.B2 the rights of co-owners was not lost and in fact it was subsisting. If it is not lost on the date of suit, as the suit was filed in 1985 claim of ouster and adverse possession will not stand. First appellate court rightly found that plaintiffs and other defendants are entitled to get their share. There is no merit in the appeal. Appeal is dismissed. Though learned counsel appearing for appellants submitted that equity and reservation was not considered by the first appellate court, it is made clear that they are to be worked out at the time of passing of the final decree.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

=====

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.629 OF 1993

13th November 2007

=====